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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, NO CR 04-0125 VRW
Plaintiff ORDER

RELIANT ENERGY SERVICES, INC.,
et al,

Defendants.

In this exceptionally long pending criminal proceeding, both the government and defendants propose extensive use of so-called "expert testimony." The government has designated three such witnesses for its case in chief; defendants have designated seven. To at least some extent, both sides have objected to the other side's experts based on pre-trial expert disclosures. The government moves to exclude defendants' experts for non-compliance with FRCrP 16, Doc #292, and also moves to exclude purportedly "irrelevant and cumulative testimony from defense experts." Doc

1 #288. Defendants have moved to exclude the testimony of one of the
2 government's experts, Richard E Goldberg. Doc #180. The court
3 first addresses the government's two motions and then turns to the
4 defense motion.

5

6 I

7 The government moves to exclude all defendants' experts
8 for failure to comply with FRCrP 16. Doc #292. The government
9 argues that the defense has produced only "vague summaries * * *
10 bereft of any of the methodologies, bases or reasons underlying
11 these opinions." Id at 1. Defendants argue that their disclosures
12 meet and exceed the requirements of Rule 16 and that the rules do
13 not require "defense reciprocal discovery." Doc #304. Defendants'
14 first argument is incorrect, their second a misconstruction of the
15 rules.

16 Taking defendants' arguments in reverse order, Rule 16
17 uses exactly the same language for the defense's discovery
18 obligation as it does for the government's obligation:

19 At the defendant's request, the government must give to
20 the defendant a written summary of any testimony that the
21 government intends to use under Rules 702, 703, or 705 of
22 the Federal Rules of Evidence during its case-in-chief at
23 trial. * * * *The summary provided under this subparagraph
must describe the witness's opinions, the bases and
reasons for those opinions, and the witness's
qualifications.*

24 Fed R Cr Proc 16(a)(1)(G)

25 The defendant must, at the government's request, give to
26 the government a written summary of any testimony that
27 the defendant intends to use under Rules 702, 703, or 705
28 of the Federal Rules of Evidence as evidence at trial, if

(i) the defendant requests disclosure under subdivision
(a)(1)(G) and the government complies * * *

1 *The summary must describe the witness's opinions, the
2 bases and reasons for those opinions, and the witness's
qualifications.*

3 Fed R Cr Proc 16(b)(1)(C).

4 It is a general rule of statutory construction that
5 "identical words used in different parts of the same act are
6 intended to have the same meaning." Gustafson v Alloyd Co, 513 US
7 561, 570 (1995) (internal quotation marks omitted). Law has its
8 subtleties, but this is not one of them.

9 It is true, as defendants argue, that simply because the
10 government chooses voluntarily to provide a greater level of detail
11 than the rule requires, the government cannot thereby force that
12 extra measure of detail from the defense. Doc #304 at 7. But, as
13 is presently explained, that is not the situation here. It is also
14 true that the mechanics of presenting expert testimony in a
15 criminal trial differ somewhat from a civil trial. In the former,
16 both the burden of proof and burden of production are balanced
17 heavily against one side. But the rules of evidence are the same
18 in a criminal case as in a civil trial, and the court's gatekeeper
19 role with respect to opinion testimony remains in both types of
20 cases. The Rule 16 discovery obligation must be read in the
21 uniform light cast by the rules of evidence. Under that light, it
22 cannot be that Rule 16 requires detailed discovery by the
23 government of proposed expert testimony and only a vague and
24 general disclosure by a defendant.

25 It makes sense, therefore, to construe Rule 16 as
26 imposing an objective level of disclosure and specificity for
27 expert testimony, rather than the unbalanced subjective obligation
28 for which defendants contend. The court can look in that regard to

1 the fundamentals of what the rules of evidence require in assessing
2 whether one side or the other has met its discovery obligation
3 under Rule 16.

4 The rudiments of that disclosure are that any party
5 seeking to offer an expert witness must disclose, in advance of the
6 witness testimony:

- 7 1) Any reports and analyses that the expert has prepared,
8 concerning the facts of the case;
- 9 2) Copies or a specification of all documents,
10 writings and other information reviewed by the expert or
11 on which the expert's opinions are based, in sufficient
12 detail so that the opinion rendered can be tested against
13 that upon which it is based;
- 14 3) The expert's work papers; and
- 15 4) The expert's curriculum vitae or professional resumé.

16 See FRCrP 16 Advisory Committee Note to the 1993 amendment ("[T]he
17 amendment requires a summary of the bases relied upon by the
18 expert. That should cover not only written and oral reports,
19 tests, reports, and investigations, but any information that might
20 be recognized as a legitimate basis for an opinion under Federal
21 Rule of Evidence 703, including opinions of other experts."); see
22 also FRCP 26(a)(2).

23 With the above rudiments in mind, the court turns to
24 defendants' disclosures. Doc #292, Ex 4. A few examples suffice
25 to illustrate the shortcomings of these disclosures:

26 Mr Jermain will testify that in his opinion, in June
27 2000, the PX markets were still considered new or
immature, and the compliance unit expected to and did see
day-to-day changed [sic] in bids submitted by the market
participants that reflected experimentation as
participants learned what strategies maximized profits,
included [sic] bidding strategies that were expected to
alter the PX clearing price. Id at 12.

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It is expected that Mr Hamal will testify regarding the structure and performance of the California wholesale markets, the physical characteristics and supply-demand conditions of the Western power markets, and the price caps and other rules in place regulating bidding leading up to and during the energy crisis. * * * It is further expected that Mr Hamal will testify that in his opinion Reliant's bidding during the week of June 19, 2000 fell within the range of bidding patterns and practices of other market participants. Id at 2.

Mr Tranen will testify that from the inception of the markets in 1998 through 2001, the CAISO and FERC implemented the tariffs regulating the market consistent with an understanding that strategic, profit-maximizing behavior, including behavior that was intended to move prices, was not prohibited unless FERC adopted a rule prohibiting the conduct after determining that the behavior was detrimental to the markets. Id at 9.

11 These disclosures are altogether too general and vague to meet the
12 basic disclosure requirements for opinion testimony.

13 Accordingly, defendants must make additional disclosures
14 to meet the fundamental requirements of FRCrP 16, as set forth
15 above. The court recognizes that FRCrP 16 does not permit the
16 court to order depositions in criminal cases, and FRCrP 15 makes no
17 provision to take a deposition in a criminal case "for convenience
18 and efficiency." United States v Fei Ye, 436 F3d 1117, 1123 (9th
19 Cir 2006). The parties may nonetheless conclude that a deposition
20 would be a better alternative to more complete disclosures. Should
21 the parties agree to that alternative, it should be acceptable.
22 But in the absence of an agreement, defendants must make
23 disclosures in accordance with the foregoing.

II

Defendants claim that all but one of their experts offer "specialized knowledge" rather than "scientific theory." Doc #304 at 8. The exception is George Schink, an economist. It is said

1 that Dr Schink performed a preliminary regression analysis. Id.
2 Any reports or analyses Dr Schink has prepared in connection with
3 this case must, of course, be produced.

4 Defendants' characterization of their other experts as
5 offering "specialized knowledge" and not "scientific theory"
6 raises a concern about the admissibility of such testimony. A
7 claim of specialized knowledge does not open the door for evidence
8 otherwise inadmissible. In the present case, the court does not
9 doubt that the working of the California electricity market is
10 sufficiently removed from common experience that some testimony on
11 this specialized knowledge may be helpful to the jury. But the
12 absence of indicia of reliability that attend testimony based on
13 "scientific or technical" knowledge warrants caution and makes a
14 fuller description of the proposed testimony than defendants have
15 heretofore provided even more appropriate and necessary. Fuller
16 disclosures would appear largely, if not entirely, to obviate the
17 government's remaining concerns. The government requests, based on
18 its review of defendants' expert disclosures, that the court
19 exclude certain categories of expert testimony. Doc #288.

A

21 First, the government argues that proposed defense expert
22 testimony that Reliant's bidding strategy did not violate market
23 rules in place as of June 2000 should be excluded in light of the
24 court's exclusion of the MMIP. Id at 3-5. The government argues
25 that if the MMIP risks overwhelming the jury's ability to define
26 illegitimate conduct for itself, expert testimony runs the same
27 risk, and that expert testimony on this subject will create an
28 incomplete version of the market rules. Id.

1 The court disagrees. Both sides can introduce testimony
2 on the market rules, including different types of conduct listed in
3 the MMIP. The parties simply may not refer specifically to the
4 MMIP. 10/17/05 Hr'g Tr at 74. The government's expert disclosures
5 show that it seeks to introduce opinion testimony on the same
6 subjects (e.g., whether Reliant manipulated the forward markets, how
7 the markets worked under competitive conditions, etc.) Doc #131.
8 Testimony on the market rules is directly relevant to the price
9 manipulation charges. Both sides can introduce this testimony
10 without reference to the MMIP.

11 The court re-iterates its warning, however, that it will
12 consider arguments by the government that defendants may have
13 opened the door to use of the MMIP on cross-examination and
14 rebuttal.

B

16 Next, the government seeks to exclude defense expert
17 testimony regarding other market participants' bidding strategies.
18 Doc #288 at 5-6. For example, defense experts plan to testify that
19 the utilities' underscheduling of demand in the PX was permissible
20 under the market rules. Id. The government argues that this has
21 no bearing on whether Reliant illegally attempted to manipulate the
22 market. Id. Defendants respond that they are entitled to present
23 evidence of how the market worked and how prices were set, which
24 includes evidence of how other market participants behaved. Doc
25 #291 at 5.

The court construes this as an extension of the government's October 2005 motion in limine to exclude evidence of uncharged conduct by PG&E and other non-party utilities. Doc #182.

1 As it did in October 2005, the court reserves ruling on this issue,
2 reiterating its statement from the 2005 pretrial conference:

3 Court: Well, I certainly share the Government's concern
4 about getting into a collateral question of whether PG&E
5 had conducted itself legally or not * * * But PG&E
6 certainly was one of the major customers. And its
7 conduct - its behavior in the market may very well
8 illuminate what our normal market process sees. And,
therefore, I don't believe that I can on a blanket basis
exclude evidence of PG&E's conduct. But I'm not going to
allow the Defendants to put PG&E on trial. And so I'll
do the best I can to try to stay on the right side of
that line. 10/17/05 Hr'g Tr at 107-08.

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10 C
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12 The government seeks to exclude defense expert testimony
on events that occurred after June 2000. Doc #288 at 6-7.
13 Specifically, the government argues that defense experts will
14 testify on emissions related events that took place after
15 defendants' decision to shut down their plants on June 21 and June
16 22, 2000. Id. These "events" were price increases and various
17 monetary penalties imposed on electricity generators. Id. The
18 government argues that these events are irrelevant because they
19 occurred after the fact and could not possibly have influenced
20 defendants' decision to shut down their plants during the week in
question. Id.

21 Defendants argue that these events are relevant to prove
22 that statements that the government alleges were false in fact were
23 true, i.e. that defendants' predictions about future market
24 conditions proved "very accurate." Doc #291 at 5-6.

25 Defendants, of course, are not on trial for the
inaccuracy of their projections about electricity prices, monetary
26 penalties or anything else. Hence, the ultimate accuracy of a
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1 belief about a future event does not help defendants. What matters
2 is whether defendants had reason to act or believe as they did when
3 they acted or made the statements attributed to them. Subsequent
4 events vindicate defendants, and are relevant, only to the extent
5 that defendants can show as a threshold matter a reason to act or
6 believe, and even then subsequent events are of limited value,
7 providing merely some evidence that defendants' acts or beliefs
8 were reasonable.

9 D

10 The government seeks to exclude expert testimony
11 regarding the alleged "objective reasonableness" of defendants'
12 decisions to shut down plants. Doc #288 at 7-8. Specifically, the
13 government objects to defense experts' testimony that it was
14 "objectively reasonable" to believe that the maintenance performed
15 at the plants was likely to improve the reliability of the units
16 and that it was "objectively reasonable" to have concerns regarding
17 the ability of the facilities to operate during the entire year
18 2000. *Id.* The government argues that this constitutes an
19 impermissible effort to tell the jury that defendants lacked the
20 requisite intent. The court will allow the testimony but warns
21 that defense experts may not draw the ultimate conclusion for the
22 jury. The testimony is only admissible insofar as it relates to
23 objective market conditions. Accordingly, Mr Tranen's proposed
24 testimony that "Reliant's conduct * * * was within the normal
25 forces of supply and demand, and could not therefore have created
26 or otherwise been intended as an attempt to create an artificial
27 price" [Doc #304, Ex 4 at 25], and similar testimony run afoul of
28 FRE 704(b) and will not be permitted.

E

Finally, the government argues that defendants intend to introduce cumulative expert testimony in the areas of market rules, strategic bidding, and alleged flaws in the analysis of government expert Dr Goldberg. Id at 8-12. The government's argument is well-taken. It appears from defendants' sketchy account of their proposed expert testimony that multiple defense experts may be offering the same opinion on numerous points. The court, however, finds that a ruling on this objection would be premature and reserves ruling until defendants have made disclosure of their proposed expert testimony adequate under FRCrP 16.

III

Last, defendants make a Daubert challenge to certain testimony of government expert Dr Richard E Goldberg. Doc #180. Dr Goldberg is the government's expert on whether manipulation of the spot market for electricity caused price artificiality in the future/forward market. Id. Defendants contend that Dr Goldberg has not sufficiently tested the statistical significance of the correlations he has observed between the spot and term markets. Id.

Dr Goldberg's report concludes that increases in spot prices during the week of June 19, 2000 were more likely than not produced by Reliant's reduced generation levels. Doc #131, Ex 4 at ¶¶ 44, 49. Dr Goldberg rejects the alternative explanation that the increase was attributable to industry news. Id at ¶¶ 46, 49. Dr Goldberg also rejects the possibility that more than half of the \\

1 increase in spot prices could have been caused by the increase in
2 gas prices. Id at ¶¶ 48, 49.

3 Dr Goldberg's opinion appears to hinge on Dr
4 Hildebrandt's testimony that Reliant's reduced generation levels
5 during the week of June 19 led to a spike in price levels. As
6 such, it appears that the probative value of Dr Goldberg's
7 testimony is quite limited. That testimony appears limited to his
8 opinion as to what part of the increased prices during the relevant
9 period can be attributed to Reliant's reduced generation levels.
10 The foundation for this testimony appears to be Dr Hildebrandt's
11 testimony.

12 If the jury does not find that Reliant's reduced
13 generation levels during the relevant period were part of a scheme
14 to manipulate the price of electricity, then Dr Goldberg's
15 testimony would appear to be irrelevant and must be excluded. The
16 sole relevance of Dr Goldberg's testimony would, therefore, appear
17 to go to the amount of loss suffered as a result of defendants'
18 alleged wrongdoing.

19 This state of the record does not permit the court to
20 exclude Dr Goldberg's testimony in its entirety. Accordingly,
21 defendant's motion is DENIED without prejudice. Even if Dr
22 Goldberg's testimony is admitted, however, it appears defendants
23 would be entitled to an instruction that unless the jury finds that
24 Reliant's reduced generation levels on June 20 and 21 caused the
25 accompanying price increase in electricity, the jury should ignore
26 and disregard Dr Goldberg's testimony.

IV

For the reasons given above, defendants are ordered to provide full expert disclosures by March 12, 2007. The government's request to exclude testimony of defendants' experts on whether defendants' behavior was within market rules or was "objectively reasonable" is DENIED. The government's requests to exclude the testimony of defendants' experts on other market participants' bidding strategies and to exclude cumulative testimony by defendants' experts are RESERVED. The government's request to exclude the testimony of defendants' experts on events that occurred after June 2000 to show truthfulness of defendants' statements made prior to those events is also RESERVED as discussed herein. Defendants' motion to preclude testimony of Dr Goldberg is DENIED without prejudice to renewal subject to Dr Hildebrandt establishing a foundation.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge